IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

THURSDAY, THE 13TH DECEMBER 2007 / 22ND AGRAHAYANA 1929

AS.No. 47 of 2003()

OS.465/1995 of PRINCIPAL SUB COURT, PALAKKAD
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APPELLANT: PLAINTIFF:

C. GOUTHAMAN, S/O. CHANDANKUTTY,
KIZHAKKE ATTAPPALAM, PUDUSSERY AMSOM,
PALAKKAD TALUK.

BY ADV. SRI.P.VIJAYA BHANU
SRI.M.GEORGE THOMAS

RESPONDENTS: DEFENDANT:

CHENTHAMARA, S/O. CHANDANKUTTY,
KIZHAKKE ATTAPPALAM, PUDUSSERY AMSOM,
PALAKKAD TALUK.

BY ADV. SRI.V.G.ARUN

THIS APPEAL SUIT HAVING BEEN FINALLY HEARD ON 27-11-2007, THE COURT ON 13-12-2007, DELIVERED THE FOLLOWING:

ORDER ON IA NO.3674/07 IN IA2494/04 IN CMP 569/03
&
IA 3637/07 IN IA2494/04 IN CMP 569/03 IN A.S.47/2003.

DISMISSED.

13-12-2007. SD/- P.R.RAMAN, JUDGE.
SD/- V.K.MOHANAN, JUDGE

//TRUE COPY//

P.R.RAMAN & V.K.MOHANAN,JJ.

A.S.NO.47 OF 2003

Dated 13th December, 2007.

JUDGMENT

Mohanan, J.

The plaintiff in O.S.No.465 of 1995 on the file of the Subordinate Judge's court, Palakkad is the appellant in this appeal Suit. The suit is for recovery of possession on the strength of title with mesne profits. The plaint 4 items of properties were managed by the defendant as an agent of the plaintiff on an undertaking to render accounts. As per the plaint averment, the properties originally belonged to the joint family of the plaintiff, defendant and their late father Chandrankutty. As per Ext.A1 partition deed C schedule was allotted to the share of the plaintiff. According to the plaintiff, the defendant had promised to pay Rs.25,000/- per year by way of profit from the plaint schedule properties which were entrusted with the defendant for management and such entrustment was made because the plaintiff was out of station as he was a bank

employee and employed at different places. But it is averred that the defendant started misappropriating the major portion of income and even stopped rendering accounts. Not only misappropriation of the income, but he had also refused the plaintiff enjoying the properties, which resulted in sending Ext.A2 lawyer notice to which Ext.A3 reply was given denying the claim of the plaintiff. However, as per Ext. A4 agreement dated 4-9-94, the dispute was settled through mediators and the defendant had agreed to surrender the lands. It is the specific case of the plaintiff that as per the said agreement 10 Palmyrah had to be cut and removed by the plaintiff but his attempt was prevented by the defendant. Therefore, he issued Ext.P5 notice to which the defendant issued Ext.A6 reply notice contending all the claims as false. Thus the plaintiff has filed the suit for recovery of the 4 items of the properties on the strength of his title and also for mesne profits at the rate of Rs.15,000/- per annum tentatively calculated and also for costs of the plaintiff.

2. Resisting the plaint averments , the defendant filed written statement and also filed an additional written

statement, when the plaint was allowed to amend, in which the defendant had contended that item No.4 had never been in his possession or management. The specific case of the defendant is that when their mother died in 1984, their father became unable to look after the matters by himself due to his illness and for managing the agriculture and for nursing the father, he talked to the plaintiff, who reluctant and expressed his lack of interest in managing agriculture. According to the defendant, the plaintiff wanted the defendant to resign his job in Sakthi Sugars, Tamil Nadu and asked him to look after the agricultural operations of the properties of the plaintiff and release the properties only on the plaintiff retiring from service. Thus according to the defendant he had given up his job and took up the management of the properties thereby the properties of the plaintiff were properly maintained. In the written statement it is specifically contended that due to drought, heavy loss up to Rs.one lakh was incurred by the defendant in the proper upkeep of the plaintiff's properties. After the death of their father, he continued the management as desired by the

plaintiff. The defendant has denied the contention of the plaintiff that he was meeting the expenses for agricultural operations. But according to the defendant it was he who had incurred the whole expenses for managing the property. It is also contented that the plaintiff used to take 10 to 12 bags of rise, grams, peas etc. from the defendant in addition to a sum of Rs.25,000/-. Meanwhile it was represented by the plaintiff that he wanted Rs.50,000/- for the construction of his house and the plaintiff offered to sell his dry land for Rs.12,000/- per acre and wet land at the rate of Rs.15,000/- and Rs.30,000/- respectively for single and double crops. It is also contended that an agreement was entered into orally and Rs.50,000/- given to the plaintiff by the defendant as advance for the due performance of the contract which was effected on 6-2-94. To realise this amount and interest @ 18% per annum, a counter claim has been filed by the defendant. It is the further case of the defendant that the plaintiff resiled from his words and sent Ext.A2 lawyer notice dated 11-4-94 to which he replied by Ext.A3. A subsequent notice Ext.A5 dated 3-5-95 was also received to which he

replied vide Ext.A6 reply stating that item No.4 had never been in his possession and the plaintiff has not shown the correct survey number and boundaries. It was also pleaded that he was not liable to account to the plaintiff and prayed for dismissal of the suit.

3. Based upon the pleadings of the rival parties and the counter claim, the trial court framed 5 issues. During the trial, on the side of the plaintiff the plaintiff himself was examined as PW-1 and marked Exts.A1 to A13 as documentary evidence. On the side of the defence, the defendant was examined as DW-1 and another witness as DW-2 was also examined. Documentary evidence as Exts. B1 to B21 produced and marked on the side of the defendant. After an elaborate discussion and evaluation of the materials and evidence on record, the suit is decreed with a direction to the defendant to hand over possession plaint item Nos. 1 to 3 to the plaintiff within one month. It is found that the plaintiff is not entitled for mesne profits. But the parties were directed to suffer their costs. The counter claim raised by the defendant is allowed and the plaintiff is

directed to pay Rs.50,000/- together with 12% interest thereon from 6-2-1994 till the date of decree and thereafter 6% per annum till the payment is effected. It is the above judgment and decree to the extent it disallowed the claim for the recovery of item No.4 and mesne profits as also against allowing the counter claim is challenged in this appeal suit.

4. The counsel for the appellant vehemently argued that the judgment and decree which are impugned in this appeal are bad to the extent, plaintiff's prayer for recovery of possession of item No.4 is denied and also the denial of mesne profits. Another grievance seems to be the allowing of counter claim in favour of the defendant. The counsel for the respondent/defendant argued that the evidence and materials on record would show that the plaintiff has received a sum of Rs.50,000/- and therefore he supports the judgment of the court below to the extent allowing the counter claim.

5. We have heard the counsel for both sides and perused the records.

6. After the appreciation of the evidence on records,

the court below came into its own on finding on facts, especially based upon the documentary evidence. It is relevant to note that initially only 3 items of properties were mentioned in the plaint and subsequently plaint item No.4 was added as per the amendment brought to the plaint. The letters i.e Exts.B9 to B11 were of the years 1983, 1993 and 1994 which denied by the plaintiff while he was examined as a witness which were contrary to his assertion in Ext.A2. Thus the documentary evidences are sufficient to probablise the case of the defendant that the plaintiff was not looking after his parents. Those letters however revealed that the plaintiff had asked to raise money even by selling his properties managed by the defendant for the construction of his house. Those documentary evidence further shows that he was enquiring the defendant whether rice was available and it also probablise the defendant's case that he used to take rice and other pulses for his domestic purposes from the defendant. Thus based upon evidence and records it can be seen that it was the defendant who was looking after their aged and

unhealthy father and managing the plaint item properties. Ext.B10 dated 3-7-1993, written by the plaintiff in which he had expressed his urgent need for money for which he has suggested to sell some of his properties. Ext.B11 dated 10-1-1994 is another document by which he was seeking financial assistance of Rs.50,000/- from the defendant. Ext.B12 dated 6-12-1994 is a receipt bearing signature of the plaintiff which contained a recital acknowledging the receipt of Rs.50,000/- from the defendant and also his readiness to sell his property. The oral evidence and other documentary evidence would show that although the plaint schedule properties, excluding item number 4, were managed by the defendant they were entrusted to the management in the background mentioned earlier by the defendant and the plaintiff was taking rice and pulse for his domestic purposes. It is also clearly established that the plaintiff received an advance of Rs.50,000/- for the performance of the agreement of sale of the property from the defendant.

7. Thus the trial court after analysis of the evidence and materials on record conclusively found that the

entrustment of the plaint item Nos.1 to 3 were made by the plaintiff on the understanding that the properties could be handed over possession to the plaintiff without any liability for accounting on his retirement. It is also found that subsequent developments changed the plaintiff's attitude and arrived on Ext.A4 understanding which was not materialised. It was also found that an amount of Rs.50,000/- had been paid to the plaintiff. The trial court under issue No.2 found that there was no evidence to show what was the profit available from item Nos. 1 to 3. The court further found that the possession of item Nos. 1 to 3 till Ext.A4 came into existence was not illegal and there was no understanding between the parties to account for the profits to the plaintiff. Thus, the suit was decreed directing the defendant to hand over possession of plaint items 1 to 3 to the plaintiff within one month and also declared that the plaintiff is not entitled for mesne profits. The counter claim raised by the defendant was allowed and the plaintiff was directed to pay Rs.50,000/- together 12% interest thereon from 16-2-94 till the date of decree and thereafter 6% per

annum till payment is effected.

8. As we have already stated above, the trial court came into such conclusion and decreed the suit on factual finding and we do not propose to interfere with such factual finding which are purely based upon the evidence and materials. At the very same time, it is relevant to note that the parties are none other than brothers and there was partition of the properties and there was no dispute with respect to the partition or otherwise. The dispute arose in the background of entrustment of the properties for management as the plaintiff was not available since he was out of station due to his employment. It was the defendant who was managing the properties. As per the judgment and decree of the court below, the court has declared that the plaintiff was not entitled to mesne profits and the parties are directed to suffer their costs.

9. Considering the above particular factual situation of the case, we are of the opinion that while confirming the direction to the plaintiff to pay Rs.50,000/- to the defendant allowing the counter claim, the direction to pay interest can

be deleted. In the result, the plaintiff is directed to pay Rs.50,000/- only without any interest to the defendant, within 3 months from today, the date of judgment. If the plaintiff is not paid the amount within the stipulated time, the defendant will be entitled to get 12% interest upon the above amount on expiry of 3 months time stipulated herein till realisation of the above amount.

With the above modification, the appeal is dismissed.

P.R.RAMAN, JUDGE.

V.K.MOHANAN, JUDGE.

kvm/-

P.R.RAMAN &
V.K.MOHANAN, J.

A.S.No.47 OF 2003

Judgment

Dated: 13-12-2007